

# **PROBATION AND SUPERVISED RELEASE: REVOCATION AND OTHER ISSUES**



**Prepared by  
the Office of General Counsel  
United States Sentencing Commission**

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## **PROBATION AND SUPERVISED RELEASE: REVOCATION AND OTHER ISSUES**

### **I. KEY STATUTORY PROVISIONS**

#### **A. General Sentencing Provisions**

##### **18 U.S.C. § 3553 Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.--** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

##### **18 U.S.C. § 3559 Sentencing classification of offenses**

**(a) Classification.**--An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is--

- (1) life imprisonment, or if the maximum penalty is death, as a Class A felony;
- (2) twenty-five years or more, as a Class B felony;
- (3) less than twenty-five years but ten or more years, as a Class C felony;
- (4) less than ten years but five or more years, as a Class D felony;
- (5) less than five years but more than one year, as a Class E felony;
- (6) one year or less but more than six months, as a Class A misdemeanor;
- (7) six months or less but more than thirty days, as a Class B misdemeanor;
- (8) thirty days or less but more than five days, as a Class C misdemeanor; or
- (9) five days or less, or if no imprisonment is authorized, as an infraction.

**(b) Effect of classification.**--Except as provided in subsection (c), an offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation, except that the maximum term of imprisonment is the term authorized by the law describing the offense.

## **28 U.S.C. § 994 Duties of the Commission**

(a) The [Sentencing] Commission. . . shall promulgate and distribute to all courts of the United States and to the United States Probation System--

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including-- [determinations of whether to impose sentence to probation, fine, imprisonment; as to the appropriate amount of fine or length of sentence of probation or imprisonment; whether imprisonment sentence should include supervised release; whether multiple sentences should run concurrently or consecutively]

. . . and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

## **B. Probation Provisions**

### **18 U.S.C. § 3563. Conditions of probation**

**(a) Mandatory conditions.**--The court shall provide, as an explicit condition of a sentence of probation--

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation;

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13), unless the court finds on the record that extraordinary

circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under subsection (b);

(3) for a felony, a misdemeanor, or an infraction, that the defendant not unlawfully possess a controlled substance;

(4) for a domestic violence crime as defined in section 3561(b) by a defendant convicted of such an offense for the first time that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant; and

(5) for a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant;

(6) that the defendant--

(A) make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and

(B) pay the assessment imposed in accordance with section 3013; and

(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation. The results of a drug test administered in accordance with paragraph(4) shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A defendant who tests positive may be detained pending verification of a positive drug test result. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3565(b), when considering any action against a defendant who fails a drug test administered in accordance with paragraph (4).

**(b) Discretionary conditions.**--The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant--

- (1) support his dependents and meet other family responsibilities;
- (2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A));
- (3) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;
- (4) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;
- (5) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;
- (6) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;
- (7) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;
- (8) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (9) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;
- (10) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation;
- (11) reside at, or participate in the program of, a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of probation;
- (12) work in community service as directed by the court;
- (13) reside in a specified place or area, or refrain from residing in a specified place or area;
- (14) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;
- (15) report to a probation officer as directed by the court or the probation officer;
- (16) permit a probation officer to visit him at his home or elsewhere as specified by the court;
- (17) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;
- (18) notify the probation officer promptly if arrested or questioned by a law enforcement officer;
- (19) remain at his place of residence during nonworking hours and, if the court finds it appropriate, that compliance with this condition be monitored by telephonic or

electronic signaling devices, except that a condition under this paragraph may be imposed only as an alternative to incarceration;

(20) comply with the terms of any court order or order of an administrative process pursuant to the law of a State, the District of Columbia, or any other possession or territory of the United States, requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living;

(21) be ordered deported by a United States district court, or United States magistrate judge, pursuant to a stipulation entered into by the defendant and the United States under section 238(d)(5) of the Immigration and Nationality Act, except that, in the absence of a stipulation, the United States district court or a United States magistrate judge, may order deportation as a condition of probation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable; or

(22) satisfy such other conditions as the court may impose.

**(c) Modifications of conditions.**--The court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the conditions of probation.

**(d) Written statement of conditions.**--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

## **18 U.S.C. § 3564. Running of a term of probation**

**(a) Commencement.**--A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

**(b) Concurrence with other sentences.**--Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any Federal, State, or local term of probation, supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation. A term of probation does not run while the defendant is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than thirty consecutive days.

**(c) Early termination.**--The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.



**(d) Extension.**--The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

**(e) Subject to revocation.**--A sentence of probation remains conditional and subject to revocation until its expiration or termination.

## **18 U.S.C. §3565 Revocation of probation**

**(a) Continuation or revocation.**--If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable--

(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and resentence the defendant under subchapter A [18 U.S.C. §§3551-3559].<sup>1</sup>

**(b) Mandatory revocation for possession of controlled substance or firearm or refusal to comply with drug testing.**--If the defendant--

(1) possesses a controlled substance in violation of the condition set forth in section 3563(a)(3);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing, thereby violating the condition imposed by section [3563(a)(5)],<sup>2</sup>

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<sup>1</sup> The pre-1994 version of § 3565 provided that when a defendant violates a condition of his probation, the district court may “revoke the sentence of probation and impose any other sentence that was available at the time of initial sentencing.” 18 U.S.C. § 3565(a)(2) (1988).

Where the violation involves possession of a controlled substance, the statute provided “the court shall revoke the sentence of probation and sentence the defendant to not less than one third of the original sentence.” *Id.*

<sup>2</sup>The statute actually reads 3563(a)(4); the reference has not been updated since 3564(a)(4) was renamed 3563(a)(5).

the court shall revoke the sentence of probation and resentence the defendant under subchapter A to a sentence that includes a term of imprisonment.

**(c) Delayed revocation.**--The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

## **C. Supervised Release Provisions**

### **18 U.S.C. § 3583 Inclusion of a term of supervised release after imprisonment**

**(a) In general.**--The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

**(b) Authorized terms of supervised release.**--Except as otherwise provided, the authorized terms of supervised release are--

- (1) for a Class A or Class B felony, not more than five years;
- (2) for a Class C or Class D felony, not more than three years; and
- (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

**(c) Factors to be considered in including a term of supervised release.**--The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

**(d) Conditions of supervised release.**-- The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The

results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition--

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

**(e) Modification of conditions or revocation.--** The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5) and (a)(6)--

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense

that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of the supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, no more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

**(f) Written statement of conditions.**--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

**(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.** --If the defendant--

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

**(h) Supervised release following revocation.**-- When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) **Delayed revocation.**--The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

## **II. APPLICABLE GUIDELINES PROVISIONS (Policy Statements)**

### **A. Background of Chapter Seven**

1. Commission decided to implement policy statements to provide flexibility to the courts, who are in a better position to assess the seriousness of the conduct constituting the violation.
2. Supervised release was introduced as a new method of post-conviction supervision and probation was changed from a suspension of sentence to a sentence itself, as redefined in the Sentencing Reform Act.
3. The flexibility of policy statements gives the Commission and courts the opportunity to evaluate the process. The Commission may eventually promulgate revocation guidelines.

### **B. Philosophy of Revocation**

1. A defendant whose conduct violates a condition of probation or supervised release is punished under Chapter Seven for a breach of the court's trust, not for the conduct that forms the basis for the revocation.
2. However, the court may take into account the seriousness of the conduct forming the basis of the revocation.

### **C. Basic Approach**

1. §7B1.1 lists the grade of violations (A, B, and C).
2. §7B1.3 gives the options available to the court for each grade of violation.
3. §7B1.4 gives the ranges of imprisonment available on revocation based on the grade of violation and the defendant's criminal history category at the time of the original sentencing.

### III. LEGAL ISSUES

#### A. General Statutory Application Problems to Keep in Mind

Effective September 13, 1994 Congress enacted the Violent Crime Control and Law Enforcement Act of 1994. This Act modified statutory provisions relating to sentencing generally and amended the provisions on probation and supervised release.

##### 1. Notable Changes to Probation Provisions

- a. modifying the resentencing procedure to be followed by the district court for revocation (see n.1, above); and
- b. eliminating a specified minimum imprisonment requirement (one-third of the original sentence) for defendants whose probation was revoked for possession of a controlled substance. *See* n.1, above.

##### 2. Notable Changes to Supervised Release Provisions

- a. adding maximum terms of imprisonment to be imposed for violations following certain classes of original offenses;
- b. eliminating a specified minimum imprisonment requirement (one-third of the original supervised release term) for defendants whose probation was revoked for possession of a controlled substance;
- c. eliminating language that some circuits had held prevented the courts from reimposition of an additional term of supervised release after revocation; and
- d. providing for delayed revocation under certain circumstances.

##### 3. *Ex Post Facto* and Savings Clause Issues, Generally

###### a. *Ex Post Facto*

Whenever a law is enacted that potentially affects the criminal penalties for acts already completed, the Constitution's prohibition against *ex post facto* laws may be triggered. The Constitution states simply: "No Bill of Attainder or *ex post facto* Law shall be passed." U.S. Const. Art. I § 9, cl. 3. The Supreme Court has interpreted this clause to prohibit any law that (1) is retrospective in that it applies to events occurring before its enactment, and (2) disadvantages the defendant by altering the definition of criminal conduct or increasing the penalty by which a crime is punishable. *California Department of Corrections v. Morales*, 514 U.S. 499, 506 n.3, 115 S. Ct.1597, 1602 n.3 (1995).

Whether a law that changes the penalties or procedures for revocation of probation or supervised release violates the *ex post facto* clause will depend on how the court resolves the issues listed by *Morales*: When asking whether the law applies to events that took place before its enactment, are the “events” at issue the initial criminal offense or the revocation conduct? Is the penalty actually increased?

Some Circuits have held that the “events” at issue are the original criminal conduct. *See, e.g., United States v. Meeks*, 25 F.3d 1117 (2d Cir. 1994); *United States v. Parriett*, 974 F.2d 523 (4th Cir. 1992); *United States v. Beals*, 87 F.3d 854 (7th Cir. 1996), *overruled on other grounds*, 128 F.3d 1167 (7th Cir. 1997); *United States v. Soto-Olivas*, 44 F.3d 788 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995).

Other Circuits have examined whether the revocation penalties came before the violation conduct, not the original offense. *See, e.g., United States v. Reese*, 71 F.3d 582 (6th Cir. 1995), *cert. denied*, 518 U.S. 1007 (1996); *United States v. Female Juvenile*, 103 F.3d 14,118 S. Ct. 83 (5th Cir.), *cert. denied*, 518 U.S. 1007 (1996).

b. Savings Clause

“The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.” 1 U.S.C. § 109. The purpose of the savings clause, commonly conceptualized as the converse of the *ex post facto* clause, is to insure that, when the law has changed to provide a lighter punishment, offenders are subject to the penalties in place at the time they committed their offense, unless Congress specifically provides that the new, lighter penalty will be retroactive.

For example, in *United States v. Schaefer*, 120 F.3d 505 (4th Cir. 1997), defendant’s revocation conduct occurred prior to the September 1994 changes to § 3565. Defendant argued that he should be sentenced under the amended version of the statute, which was in effect by the time he was arrested and brought in for revocation of his probation. The amended version of the statute would have allowed the district court to depart downward from the initial guideline range for grounds not mentioned at the original sentencing. Fourth Circuit jurisprudence had not permitted such a

departure under the prior law. The court held that Schaefer was properly sentenced under the law in effect at the time of his revocation conduct, pursuant to the savings clause.

- c. The *ex post facto* clause and the savings clause have been raised by litigants and the courts in connection with several issues of probation and supervised release.

## **B. Applicability of Chapter Seven Policy Statements**

1. Prior to the enactment of the Violent Crime Control and Law Enforcement Act of 1994 (1994 Crime Bill), circuit courts of appeal held that the Chapter Seven Policy Statements must be considered by the district court upon revocation, but are advisory and not binding.

*United States v. O'Neil*, 11 F.3d 292 (1st Cir. 1993)

*United States v. Anderson*, 15 F.3d 278 (2d Cir. 1994)

*United States v. Blackston*, 940 F.2d 877 (3rd Cir.), *cert denied*, 502 U.S. 992 (1991)

*United States v. Davis*, 53 F.3d 638 (4th Cir. 1995)

*United States v. Mathena*, 23 F.3d 87 (5th Cir. 1994)

*United States v. Sparks*, 19 F.3d 1099 (6th Cir. 1994)

*United States v. Hill*, 48 F.3d 228 (7th Cir. 1995)

*United States v. Levi*, 2 F.3d 842 (8th Cir. 1993)

*United States v. Forrester*, 19 F.3d 482 (9th Cir. 1994)

*United States v. Lee*, 957 F.2d 770 (10th Cir. 1992)

*United States v. Thompson*, 976 F.2d 1380 (11th Cir. 1992)

*United States v. Hooker*, 993 F.2d 898 (D.C. Cir. 1993)

2. The 1994 Crime Bill enacted 18 U.S.C. § 3553(a)(4), listed above in Part I, which requires that in the case of a violation of probation or supervised release the court must consider the applicable guidelines or policy statements issued by the Sentencing Commission.
3. All circuits (except the Ninth, see below) that have considered the issue have held that it is mandatory that the district court consider the guidelines' policy statements when revoking probation, although they remain advisory and nonbinding.

*United States v. Lambert*, 77 F.3d 460 (Table, unpublished), 1996 WL 84114, No. 95-2115 (1st Cir. Feb. 26, 1996) ("in sentencing Lambert, the court was required to consider applicable United States Sentencing Commission policy statements, including statements pertaining to supervised release violations.")

*United States v. Cohen*, 99 F.3d 69 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997)



*United States v. Schweigel*, 126 F.3d 551 (3d Cir. 1997)  
*United States v. Pierce*, 75 F.3d 173 (4th Cir. 1996)  
*United States v. Escamilla*, 70 F.3d 835 (5th Cir.1995), *cert. denied*, 517 U.S. 1127 (1996)  
*United States v. West*, 59 F.3d 32 (6th Cir.), *cert. denied*, 516 U.S. 980 (1995)  
*United States v. Doss*, 79 F.3d 76 (7th Cir.1996) (“The policy statement set out in §7B1.4(a) is entitled to great weight. It is an element in the exercise of a judge’s discretion in sentencing. It would be an abuse of his discretion to ignore it. But it doesn’t have to be followed.”)  
*United States v. Oates*, 105 F.3d 663 (Table, unpublished), 1997 WL 1837, No. 96-2907 (8th Cir. Jan. 3, 1997) (“The provisions in Chapter Seven are merely advisory and do not have binding effect. Nevertheless, district courts must consider these provisions before imposing sentence, as 18 U.S.C. § 3583(e)(3) directs district courts resentencing an offender after revocation of supervised release to consider the factors set forth in 18 U.S.C. § 3553(a), which in turn requires, among other things, that the court consider any applicable policy statements.”) (remanding because the court did not consider the policy statements)  
*United States v. Vogt*, 106 F.3d 414 (Table, unpublished), No. 96-1192, 1997 WL 20125 (10th Cir. Jan. 21, 1997) (“It is doubtful that Congress could have more clearly stated that, in formulating sentences, district courts are generally to consider the guidelines promulgated pursuant to 28 U.S.C. § 994(a)(2), while in cases concerning revocation of probation or supervised release they are to consider the applicable guidelines or policy statements issued pursuant to § 994(a)(3)).”<sup>3</sup>  
*United States v. Hofierka*, 83 F.3d 357 (11th Cir.1996), *cert. denied sub nom. Andrews v. United States*, 117 S. Ct. 717 (1997) (the amendment to §3553 does not render the sentencing range in Chapter Seven mandatory)

4. Ninth Circuit. In *United States v. Plunkett*, 94 F.3d 517 (9th Cir. 1996), the Ninth Circuit concluded that, despite the specific mention of the policy statements in 18 U.S.C. § 3553(a)(4)(B), consideration of the policy statements in resentencing after revocation of probation is not mandatory. The court reasoned that the use of the “or” (“the applicable guidelines or policy statements issued by the Sentencing Commission”) affords the district court discretion in sentencing probation or supervised release violators to rely upon either the initial sentencing ranges contained in Chapter Five or the revocation and modification sentencing ranges contained in the policy statements of Chapter Seven. However, post-*Plunkett* cases have implicitly retreated from this position, stating that “when the district court imposes a

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<sup>3</sup>Chapter Seven contains the policy statements issues pursuant to 28 U.S.C. § 994(a)(3).

sentence after revoking probation, it must consider the relevant Guideline policy statements,” and noting that the policy statements themselves state that the court may “revoke probation and impose any sentence that initially could have been imposed.” *See, e.g., United States v. Nieblas*, 115 F.3d 703 (9th Cir. 1997), citing USSG Ch.7, Pt. A 2(a), intro. comment. and 18 U.S.C. § 3565(a)(2).

## **C. Term of Imprisonment Available Upon Revocation**

### **1. Imprisonment on Revocation of Probation**

- a. Prior to the 1994 Crime Bill, 18 U.S.C. § 3565(a)(2) provided that the court should resentence defendant to any sentence available under Subchapter A (§§ 3551-3559) at the time of initial sentencing. The Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits, interpreted this provision to mean that probation violators could not be sentenced to a term of imprisonment greater than guideline sentencing range available at the time of the initial sentencing for the underlying crime.

*United States v. Boyd*, 961 F.2d 434 (3rd Cir.), *cert. denied*, 506 U.S. 881 (1992)

*United States v. Alli*, 929 F.2d 995 (4th Cir. 1991)

*United States v. Von Washington*, 915 F.2d 390 (8th Cir. 1990)

*United States v. Forrester*, 19 F.3d 482 (9th Cir. 1992)

*United States v. Maltais*, 961 F.2d 1485 (10th Cir. 1992)

*United States v. Smith*, 907 F.2d 133 (11th Cir. 1990)

*United States v. Dow*, 990 F.2d 22 (1st Cir. 1993)

- b. Under the 1994 Crime Bill, a court is instructed to “resentence the defendant under subchapter A.” Subchapter A encompasses 18 U.S.C. §§ 3551-3559, the general statutes for criminal penalties. Section 3553(a)(4)(B) specifically directs the courts to consider the guidelines and policy statements promulgated by the Sentencing Commission when considering a revocation sentence. Section 3559 lays out the maximum terms of imprisonment authorized for classes of federal offenses. Generally, then, the sentencing range upon revocation of probation is determined by considering the Chapter Seven policy statements and cannot exceed the statutory maximum term of imprisonment for the original offense. The cases listed above at section III. B. 3. generally support this proposition.

## 2. Imprisonment on Revocation of Supervised Release

- a. Prior to the 1994 Crime Bill, 18 U.S.C. § 3583(e) stated that upon revocation of a term of supervised release, the defendant could be required to serve in prison all or part of “the term of supervised release” without credit for time previously served on post-release supervision, provided that if the defendant had been convicted of a Class B felony, he could not be required to serve more than three years in prison; if the offense was a Class C or D felony, he could not be required to serve more than 2 years in prison.
- b. The 1994 amendment to § 3583(e) states that upon revocation of supervised release, a defendant may be required to serve in prison all or part of “the term of supervised release authorized by statute for the original offense,” without credit for time previously served on postrelease supervision, except that the maximum term of imprisonment upon revocation of supervised release when the original offense was a Class A felony is 5 years; the revision left untouched the maximum term for a Class B felony at 3 years and for a Class C or D felony to 2 years; the amendment limited the maximums for any other case (Class E felony or a Class A misdemeanor) to 1 year.
- c. Several courts have held that the term of imprisonment that can be imposed upon violation of supervised release is not limited by the maximum term of imprisonment that was available under the guideline range for the original offense.

*United States v. Stephenson*, 928 F.2d 728 (6th Cir. 1991)

*United States v. Mandarelli*, 982 F.2d 11 (1st Cir. 1992)

*United States v. Dillard*, 910 F.2d 461 (7th Cir. 1990)

*United States v. Smeathers*, 930 F.2d 18 (8th Cir. 1991)

## 3. Imposition of Consecutive Terms of Imprisonment Upon Revocation of Concurrent Term of Supervised Release

*United States v. Cotroneo*, 89 F.3d 510 (8th Cir.), *cert. denied*, 117 S. Ct. 533 (1996): The court of appeals held that, upon revocation of defendant’s concurrent terms of supervised release, the district court had the authority to impose consecutive terms of imprisonment. The court of appeals rejected defendant’s argument that imposition of imprisonment upon revocation of supervised release is controlled by 18 U.S.C. 3624(e), which requires that terms of supervised release run concurrently. Instead, the process is governed by 18 U.S.C. § 3584(e), which states that, if multiple terms of imprisonment are imposed at the same time, the terms may run

concurrently or consecutively. *See also United States v. Johnson*, 138 F.3d 115 (4th Cir. 1998).

#### **D. Sentencing Above the Policy Statement Ranges**

The Supreme Court has held that before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling, identifying the ground for departure. *Burns v. United States*, 501 U.S. 129, 138-39, 111 S. Ct. 2182, 2187 (1991).

Circuits that have addressed the issue have held that this notice requirement does not apply to deviations from the non-binding policy statements found in Chapter Seven of the Guidelines. Because these policy statements are merely advisory, the sentencing court is not “departing” from any binding guideline when it imposes a sentence in excess of the range recommended by the Chapter Seven policy statements. When imposing a sentence for violation of supervised release, the court is bound only by the statutory maximum imposed by Congress, and is therefore under no obligation to provide notice to defendants of its intent to exceed the non-binding sentencing ranges recommended in Chapter Seven of the Guidelines. *See United States v. Pelensky*, 129 F.3d 63, 70-71 (2d Cir. 1997); *United States v. Burdax*, 100 F.3d 882, 885 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1283 (1997); *United States v. Hofierka*, 83 F.3d 357, 362 (11th Cir. 1996), *modified*, 92 F.3d 1108 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 717 (1997); *United States v. Mathena*, 23 F.3d 87, 93 n. 13 (5th Cir. 1994).

#### **E. Mandatory Revocation for Possession of a Controlled Substance**

##### **1. Mandatory Revocation of Probation**

18 U.S.C. §3565(b) requires mandatory revocation of probation for possession of a controlled substance.

##### **a. Pre-Crime Bill**

From December 31, 1988 until the enactment of the 1994 Crime Bill, § 3565(a) required probation revocation and a sentence of at least “one-third of the original sentence” for possession of a controlled substance.<sup>4</sup> The Supreme Court interpreted “one-third of the original sentence” to mean “one-third of the original guideline range.” Therefore, in the typical case, the minimum sentence is one-

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<sup>4</sup>Section 7303(a)(2) of Pub. L. 100-690, which amended 18 U.S.C. § 3565 to add the “original sentence” provision, applied to persons whose probation, supervised release, or parole began after December 31, 1988.

third of the maximum of the original guideline range. The maximum sentence is the maximum of the original guideline range. *United States v. Granderson*, 511 U.S. 39 (1994).

Note on downward departures to probation: Occasionally the court has made a downward departure from a high guideline range in order to impose a sentence of probation. Dicta in *Granderson* speculated that, in such cases, when probation is later revoked for possession of a controlled substance, the “applicable guideline range” referred to in the statute is the maximum of the guideline range permitting a sentence of probation.

In a case that involved such a downward departure, the Ninth Circuit upheld a sentence of imprisonment that was higher than the maximum guidelines range permitting a sentence of probation. In *United States v. Redmond*, 69 F.3d 979, 981 (9th Cir. 1995), the court noted that defendant’s probation was revoked under the general authority of § 3565(a)(2), which governs violation of a condition of probation, as opposed to the specific drug possession provision—even though defendant’s violation was using cocaine. Therefore, the reasoning of *Granderson* was inapplicable. The Ninth Circuit also noted that following the *Granderson* dicta in such cases would produce anomalous results.

b. Post-Crime Bill

The 1994 Crime Bill eliminated the mandatory imprisonment requirement of one-third of the original sentence. Instead, § 3565(b) now provides that, if a defendant violates probation conditions by possessing a controlled substance or refusing to comply with drug testing, the court shall revoke probation and resentence under subchapter A to a sentence that includes a term of imprisonment.

The Crime Bill also added a provision to § 3563(a) that allows the court to exempt a defendant from the mandatory revocation rule of § 3565(b): in the case of a defendant who fails a drug test, court shall consider whether the availability of appropriate substance abuse programs, or the individual’s current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. § 3565(b). This provision makes reference to and is supported by the guidelines. *See* USSG §7B1.4, p.s., comment. (n.6) (1997).

## 2. Mandatory Revocation of Supervised Release

18 U.S.C. § 3583(g) requires revocation of supervised release for possession of a controlled substance.

### a. Pre-Crime Bill

From December 31, 1988 until the enactment of the 1994 Crime Bill, 18 U.S.C. § 3583(g) required mandatory revocation of supervised release and a sentence of at least “one-third of the term of supervised release” for possession of controlled substances.

### b. Post-Crime Bill

The 1994 Crime Bill eliminated the mandatory term of “one-third of the term of supervised release” imprisonment requirement. Instead, § 3583(g) now provides that the court shall revoke the term of supervised release and require the defendant to serve term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

The Crime Bill also amended § 3583(d) to provide an exception to mandatory imprisonment for defendants who fail a drug test. The exception allows the court to consider “whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with the United States Sentencing Commission guidelines from the rule of section 3583(g).” This provision makes reference to and is supported by the guidelines. *See* USSG §7B1.4, p.s., comment. (n.6) (1997). In *United States v. Pierce*, 132 F.3d 1207 (8th Cir. 1997), the court remanded a revocation based on a failed drug test to allow the district court to consider whether to apply the exception to mandatory revocation. The court stated that if the district court finds an offender to be in illegal possession of a controlled substance, imprisonment is mandated. If, however, the court simply finds that one on probation failed a drug test, then the court is free to require further participation in a substance-abuse program. Although a court may find possession based on a positive drug test, it is not required to do so and the court may provide for treatment without revoking the offender's release.)

### 3. Positive Urinalysis as Evidence of Drug Possession

For purposes of mandatory revocation of probation or supervised release (18 U.S.C. § 3565(a) and § 3583(g)), the appellate courts have held that evidence of drug use is evidence of possession.

*United States v. Dow*, 990 F.2d 22 (1st Cir. 1993)

*United States v. Gordon*, 961 F.2d 426 (3d Cir. 1992) (positive urine test is circumstantial evidence of possession)

*United States v. Clark*, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027600 (1994)

*United States v. Smith*, 978 F.2d 181 (5th Cir. 1992)

*United States v. Hancox*, 49 F.3d 223 (6th Cir. 1995)

*United States v. Young*, 41 F.3d 1184 (7th Cir. 1994)

*United States v. Pierce*, 132 F.3d 1207 (8th Cir. 1997)

*United States v. Baclaan*, 948 F.2d 628, 630 (9th Cir. 1993)

*United States v. Rockwell*, 984 F.2d 1112 (10th Cir. 1993) (controlled substance in person's body is possession for purposes of mandatory revocation provisions), *cert. denied*, 508 U.S. 966 (1993)

*United States v. Almandi*, 992 F.2d 316 (11th Cir. 1993) (positive urine test may equate to possession)

## F. Maximum Term of Supervised Release That May Be Imposed

### 1. Relevant Statutory Provisions

18 U.S.C. § 3583(b) sets the maximum authorized terms of supervised release, *except as otherwise provided* (emphasis added); this applies to the initial imposition of supervised release.

Subsection (e)(2) provides for extensions of a term of supervised release if less than the maximum authorized term was previously imposed: the court may modify, reduce, or enlarge the conditions of supervised release at any time prior to the expiration or termination of the term of supervised release. Subsection (e)(3) provides that a court may revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, 3 years if a class B felony, 2 years if a class C or D felony, or more than one year in any other case.

Subsection (h) provides for reimposition of supervised release after revocation.

### 2. Maximum Term at Initial Sentencing

Certain statutes, notably the drug statute, 21 U.S.C. § 841, provide for specific *minimum* terms of supervised release. In a particular defendant's case, the minimum term of supervised release provided by § 841 may be less than, equal to, or greater than the maximum term set for the offense in § 3583(b).

Can the 3583(b) maximums be exceeded?

a. Yes

The **Second Circuit** has held that, in cases where the minimum required by § 841 is the same as the maximum authorized by § 3583(b), the maximum set by § 3583(b) does not apply. *United States v. Eng*, 14 F.3d 165 (**2d Cir.**), *cert. denied*, 513 U.S. 807 (1994). The court noted that 3583(b) sets the maximums "except where otherwise provided"; thus, the more specific provisions of § 841 override. The court has also held that the maximums in § 3583(b) do not apply in a case where the minimum required by § 841 was less than the maximum authorized by § 3583(b). *United States v. Williams*, 65 F.3d 301 (2d Cir. 1995). The court based its conclusions ultimately in the departure discretion of the district court; there was no ruling as to what, if any, might be the maximum term available when § 3583(b) does not apply.

*United States v. Page*, 131 F.3d 1173 (**6th Cir.** 1997), *petition for cert. filed* (March 23, 1998) (No. 97-8416), held that § 3583(b) maximums do not limit the terms set under § 841. *United States v. LeMay*, 952 F.2d 995 (**8th Cir.** 1991), also rejected the argument that the guideline maximum applies. In *United States v. Orozco-Rodriguez*, 60 F.3d 705 (**10th Cir.** 1995), the § 841 minimum and § 3583(b) maximum were both 3 years and defendant was sentenced to 4 years of supervised release; the appellate court held § 3583(b) maximum did not apply; however, the court rejected defendant's argument that there was effectively no maximum without § 3583. Court noted the guidelines provided a maximum of 5 years.

Initially, in dicta, the **Ninth Circuit** speculated that § 3583's maximums did not apply where the minimum was derived from § 841. However, the court later reexamined the issue statements and held that, while the § 3583(b) maximums do not apply, the guideline maximum may apply. *United States v. Fuentes-Mendoza*, 56 F.3d 1113 (9th Cir.), *cert. denied*, 516 U.S. 925 (1995).

b. No



In *United States v. Good*, 25 F.3d 218 (4th Cir. 1994), the **Fourth Circuit** decided that the maximums do apply in a case in which the § 841 minimum was less than the § 3583(b) maximum, and noted that the guidelines provided a similar maximum. The **Fifth Circuit** has ruled that the § 3583(b) limits do apply, at least in cases in which the § 841 minimum is equal to the § 3583(b) maximum. *United States v. Kelly*, 974 F.2d 22 (5th Cir. 1992).

3. “Extending” a Term of Supervised Release

Subsection 3583(e)(2), the “extension” provision, is implicated in this discussion in the following way: if a court may extend a term of supervised release if less than the maximum term was imposed, what happens when there is no maximum term under § 3583(b)? Could the defendant conceivably be subject to a lifetime term of supervised release, and thereby constantly subject to imprisonment through violation of a condition of release?

Not an issue for the Fourth and Fifth Circuits, which have held that the § 3583(b) maximums apply; does not seem to be an issue for the Ninth and Tenth Circuits, which have taken refuge in the guideline maximum. (In fact, it was in the context of this very question that the Ninth Circuit held that the guideline maximums apply.)

Remains an open question for the Second Circuit, however, which has not noted any maximum for supervised release terms imposed under § 841, except perhaps the discretion of the court; Sixth and Eighth Circuits also open.

4. Supervised Release Following Revocation

Subsection 3583(h) provides that when a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a term of supervised release following the imprisonment. The length of the term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

Assuming that, upon revocation, a court imposes less than the maximum term of imprisonment authorized by (e)(3), what is the term of supervised release that then may be (re-) imposed? There is no required minimum term of supervised release; although there have not been any decisions on the issue, the mandatory minimum terms of 21 U.S.C. § 841 would not seem to

apply, as that statute speaks only to the initial imposition of supervised release, not (re-) imposition after revocation.

The maximum term available, however, is a separate question. Subsection 3583(h) tells us only that the term *may not exceed the term of supervised release authorized by statute for the offense* that resulted in the original term of supervised release, less any term of imprisonment imposed on revocation. As discussed above, for most offenses, the maximum term of supervised release authorized by statute is limited by § 3583(b). For offenses to which the § 3583(b) maximums do not apply, however, the maximum term available upon revocation will presumably be the same as the maximum term upon initial imposition, according to the various circuit courts. For example, the Second Circuit's view is that 21 U.S.C. § 841 authorizes up to a life term of supervised release; therefore the same maximum will be available upon revocation. In the Fifth and Fourth Circuits, the maximum authorized term is determined with reference to § 3583(b), at least in those cases in which the minimum term required by 21 U.S.C. § 841 does not exceed the § 3583(b) maximums. In those cases, at least, we know that the same maximum caps the term of supervised release that may be re-imposed following revocation. Thus a court's decision on maximums in the initial imposition will determine the maximums upon re-imposition after revocation.

Another interesting aspect of subsection (h) is that it may answer the hypothetical posed in *Eng*. *Eng* argued that, if there is no cap to the term of supervised release imposed, a defendant is potentially subject to a lifetime of supervised release and, with it, the constant threat of revocation and imprisonment. This issue can arise on initial imposition, extension, or re-imposition following revocation. In circuits where the question of maximums remains open, this is a concern. In such cases, subsection (h) may provide the only end in sight to supervision: first, if a defendant's supervision is revoked, supervision may only be re-imposed if the court sentences the defendant to less than the maximum term of imprisonment authorized by subsection (e)(3). Thus, if the defendant is sentenced to the maximum under subsection (e)(3), no term of supervised release. Second, the language of subsection (e)(3) suggests that its limits impose a cumulative cap; that is, successive prison sentences upon revocation, when added together, cannot exceed the total provided for in subsection (e)(3). This conclusion derives from the fact that the terms of imprisonment provided by subsection (e)(3) are related to the original offense that resulted in the supervised release, not to the violation that led to the revocation.<sup>5</sup>

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<sup>5</sup>This view is supported by the Ninth Circuit's analogous approach to the extension provision in *United States v. Fuentes-Mendoza*, 56 F.3d 1113 (9th Cir. 1995).

Thus, once a defendant has been sentenced to the maximum term of imprisonment provided by subsection (e)(3), whether all at once or after several revocations, the court's power to re-impose supervised release under subsection (h) is extinguished. Subsection (h) authorizes a court to re-impose supervised release only when the defendant has been required to serve a term of imprisonment that is less than the subsection (e)(3) maximum.

## **G. Reimposition of Supervised Release**

### **1. Prior to the 1994 Crime Bill:**

- a. The Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits prohibited recommencing or reimposing an additional term of supervised release after revocation of the supervised release term. The courts interpreted § 3583(e) as allowing a district court, upon revocation of supervised release, either to impose a term of imprisonment or to extend defendant's supervised release, but not both. This interpretation hinged on the use of the disjunctive "or" in the alternatives listed in § 3583(e).

*United States v. Koehler*, 973 F.2d 132 (2d Cir. 1992)

*United States v. Malesic*, 18 F.3d 205 (3rd Cir. 1994)

*United States v. Cooper*, 962 F.2d 339 (4th Cir. 1992)

*United States v. Holmes*, 954 F.2d 270 (5th Cir. 1992)

*United States v. Truss*, 4 F.3d 437 (6th Cir. 1993)

*United States v. McGee*, 981 F.2d 271 (7th Cir. 1992)

*United States v. Behnezhad*, 907 F.2d 896 (9th Cir. 1990)

*United States v. Rockwell*, 984 F.2d 1112 (10th Cir.), *cert. denied*, 508 U.S. 966 (1993), *overruling United States v. Boling*, 947 F.2d 1461, 1463 (10th Cir. 1991)

*United States v. Tatum*, 998 F.2d 893 (11th Cir. 1993)

- b. The First and Eighth Circuits permitted recommencing or reimposing a term of supervised release after revocation of the supervised release term.

*United States v. O'Neil*, 11 F.3d 292 (1st Cir. 1993)

*United States v. Stewart*, 7 F.3d 1350 (8th Cir. 1993)

### **2. Post-Crime Bill**

The 1994 Crime Bill added § 3583(h), which provides that, with certain limitations, a sentencing court may impose supervised release upon revocation of supervised release.

- a. The effective date of § 3583(h) is September 13, 1994.
- b. The Circuits have differed on whether the new provision may be applied to a defendant whose original offense was committed before September 13, 1994.
- c. The concern is whether the new penalty violates the Constitution's prohibition against *ex post facto* laws. Art. I, § 9, cl. 3. Application of a law violates the *ex post facto* clause if (1) the law applies to events occurring before its enactment; and (2) the law disadvantages the defendant by altering the definition of criminal conduct or increasing the penalty by which a crime is punishable. The Circuits have taken conceptually different approaches to the problem.

**Third Circuit:** In *United States v. Brady*, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 773 (1997), the court reasoned that, under the prior law as interpreted by the circuit, a defendant whose original offense was a Class A felony who then violated supervised release could be sentenced to imprisonment under § 3583(e)(3) for up to the maximum term of supervised release for a given offense, without any credit for the time spent on supervised release. Under the new subsection (h), the district court may impose a new term of consecutive supervised release, but the term may not exceed the maximum term of supervised release authorized for the offense, minus the term of imprisonment imposed upon revocation of the original term of supervised release. The legal consequence, loss of freedom, is the same; the availability of supervised release in no way increased the amount of time he was exposed to incarceration; thus subsection (h) did not increase the penalty for his original offense and there was no *ex post facto* violation.

In a later case, *United States v. Dozier*, 119 F.3d 239 (3d Cir. 1997), the court held that there was an *ex post facto* violation for those defendants who committed a Class B, C, or D felony prior to the enactment of § 3583(h). Under the old law, the greatest sentence of imprisonment the defendant could receive was 24 months; under the new law, he could be sentenced to imprisonment of up to 24 months, plus supervised release of up to an additional 12 months, for a total possible punishment of 36 months. Thus, the enactment of § 3583(h) had the effect of increasing the penalty for this defendant and for others similarly situated.

**Fourth Circuit:** In *United States v. Lominac*, 144 F.3d 308 (4th Cir. 1998), the court held that reimposition of supervised release on a defendant whose offense occurred prior to the enactment of § 3583(h) violated the *ex post facto* clause because the provision had

the effect of increasing defendant's total punishment. The court followed the same analysis as the Third Circuit in *Dozier*, discussed above from which it may be surmised that it may reject an *ex post facto* argument where defendant was convicted of a Class A felony.

**Sixth Circuit:** In *United States v. Page*, 131 F.3d 1173 (6th Cir. 1997), *petition for cert. filed*, (March 23, 1998) (No. 97-8416) the court stated that there was no *ex post facto* violation in applying § 3583(h) to reimpose supervised release because the statute was passed before the defendants violated the terms of their supervised release, which precipitated their new sentences. The court cited several unpublished opinions of the circuit that had reached the same conclusion under similar facts. *See also United States v. Abington*, 144 F.3d 1003 (6th Cir. 1998).

**Seventh Circuit:** In *United States v. Withers*, 128 F.3d 1167 (7th Cir. 1997), the Seventh Circuit overruled a prior decision<sup>6</sup> to hold that the imposition of a second term of supervised release following revocation, pursuant to § 3583(h), was not an *ex post facto* violation as to a defendant whose original offense occurred prior to its enactment, because the revision did not inflict a harsher punishment than allowed previously.

**Eighth Circuit:** In *United States v. St. John*, 92 F.3d 761 (8th Cir. 1996), the Eighth Circuit reasoned that, because it had repeatedly upheld imposition, upon revocation of supervised release, of terms of imprisonment and of supervised release, there was no claim of *ex post facto* violation. A defendant is not potentially subject to an increased penalty under § 3583(h) because, given the court's past interpretation of § 3583(e)(3), the maximum time period a defendant's freedom can be restrained upon revocation of supervised release under the new law is either the same as, or possible less than, under the prior law. Note: this circuit interprets "term of supervised release" in both § 3583(e) and § 3583(h) to mean "the term of supervised release as originally imposed by the district court at sentencing." *See* 92 F.3d at 766.

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<sup>6</sup>In *United States v. Beals*, 87 F.3d 854, 859 (7th Cir. 1996), the Seventh Circuit reasoned that because the behavior that constitutes a violation of supervised release is not always a crime, it is impossible to separate the punishment imposed for the subsequent conduct from the original offense and makes sense to link the punishment to the original offense for *ex post facto* purposes. Therefore, if, at the time of the original offense, § 3583(e) did not permit a district court to sentence a defendant to subsequent supervised release terms, reimposing supervised release upon revocation, even if the violation behavior occurred after September 13, 1994, would constitute an *ex post facto* violation. *Beals* was explicitly overruled in *Withers*.

**Ninth Circuit:** In *United States v. Collins*, 118 F.3d 1394 (9th Cir. 1997), the Ninth Circuit held that defendants whose original offense was committed prior to enactment of § 3583(h) could, upon revocation, be subject to an additional term of imprisonment or an extension of supervised release, but not both. The later enactment of § 3583(h) changed the law to a defendant's detriment and therefore could not be applied retroactively.

**Tenth Circuit:** In an unpublished disposition, *United States v. Wash*, 97 F.3d 1465 (Table), 1996 WL 536563 (No. 95-4156, 10th Cir. Sept. 23, 1996) (unpublished), the Tenth Circuit noted that, at the time defendant committed his offense of conviction, the law of the circuit did allow the imposition of terms of both imprisonment and supervised release upon revocation of a term of supervised release, in accordance with the court's opinion in *United States v. Boling*, 947 F.2d 1461, 1463 (10th Cir. 1991). Although *Boling* was subsequently overruled by *United States v. Rockwell*, 984 F.2d 1112 (10th Cir.), *cert. denied*, 508 U.S. 966 (1993), it was the law of the circuit at the time of defendant's offense and therefore § 3583(h) does not increase the punishment applicable at the time of the original offense.

## **H. Delayed Revocation**

### **1. Probation**

18 U.S.C. § 3565(c) provides that probation revocation can be delayed for a reasonable period after expiration of a probation term for a violation that occurred within the term, if a warrant or summons is issued within the term.

### **2. Supervised Release**

- a. Before the 1994 Crime Bill, there was no explicit statutory authority to delay revocation of supervised release until after the term expires. However, in *United States v. Neville*, 985 F.2d 992 (9th Cir.), *cert. denied*, 508 U.S. 943 (1993), the Ninth Circuit found inherent in 18 U.S.C. § 3583 the power to delay revocation.
- b. The 1994 Crime Bill amended 18 U.S.C. § 3583 to specify that the power of the court to revoke a term of supervised release for violation of a condition of supervised release (and to order defendant to serve term of imprisonment and further supervised release) extends after expiration of supervised release for a period reasonably necessary for adjudication of the violation, if a warrant or summons has been issued on the basis of an allegation of such a violation. 18 U.S.C. § 3583(i).

**I. Probation and Supervised Release Imposed Under the Assimilative Crimes Act, 18 U.S.C. § 13**

**1. Probation**

*United States v. Gaskell*, 134 F.3d 1039 (11th Cir.), *cert. denied*, 118 S. Ct 1541 (1998): The district court properly sentenced defendant under the ACA to five years' probation, even though the term of imprisonment for the offense under state law could not exceed one year. The court of appeals held that federal courts sentencing under the Assimilative Crimes Act may exceed the state statutory maximum term for a sentence of probation when necessary to effectuate the policies behind the federal probation statutes.

**2. Supervised Release**

*United States v. Pierce*, 75 F.3d 173 (4th Cir. 1996): Defendant pled guilty under ACA and was sentenced to one year of probation. His probation was revoked and he was sentenced to 30 days' imprisonment followed by one year of supervised release. The maximum sentence under state law for the assimilated offense was 60 days' imprisonment. The Fourth Circuit held that the court could impose supervised release despite its unavailability under state law; further, the term of incarceration plus supervised release that exceeded the state maximum term of imprisonment did not violate the ACA. A federal court will not adopt provisions of state law that conflict with federal sentencing policy. "If limited to the maximum term of imprisonment permitted by the state, a district court would be unable to impose an appropriate term of supervised release upon individuals it determined to be in need of post-incarceration supervision, even though the crime was committed within an area of federal jurisdiction."

*See also United States v. Engelhorn*, 122 F.3d 508 (8th Cir. 1997); *United States v. Burke*, 113 F.3d 211 (11th Cir. 1997) (citing *Pierce*, court upheld a sentence of one year of imprisonment followed by one year of supervised release in an ACA case where state law provided for a one-year maximum term of incarceration). In *United States v. Rapal*, 146 F.3d 661 (9th Cir. 1998), defendant was convicted under the ACA of violating Hawaiian law. The court upheld the total sentence of incarceration and supervised release, even though it exceed the maximum term allowed under state law, in order to further the federal policy behind supervised release.

## **J. Conditions Imposed**

### **1. Probation Conditions**

*United States v. Sun Diamond Growers of California*, 138 F.3d 961 (D.C. Cir. 1998), *petition for cert. filed* (July 21, 1998) (No. 98-131) (district court erred in requiring that members of defendant-agricultural cooperative be subject to reporting requirements as a condition of cooperative's probation. There is no precedent for the imposition of probationary conditions on entities who are not defendants. Imposition of a condition on a third party exposes the defendant to revocation for "violations" by persons not under his control. Section 3563 specifies that "defendant" is the person to be burdened with conditions of probation.)

*United States v. Schiff*, 876 F.2d 272 (2d Cir. 1989) (condition that probationer not advocate noncompliance with tax statutes reasonably related to crime of tax evasion)

*United States v. Voda*, 994 F.2d 149 (5th Cir. 1993) (condition that probationer not possess a firearm while on probation was abuse of discretion where underlying crime was negligent discharge of a pollutant)

*United States v. Stoural*, 990 F.2d 372 (8th Cir. 1993) (condition that probationer not use alcohol and subjecting him to warrantless searches for alcohol and drug use held not reasonably related to crime of conversion of collateral)

*United States v. Clark*, 918 F.2d 843 (9th Cir. 1990) (condition that probationers publicly apologize reasonably related to the permissible end of rehabilitation for the crime of perjury before the Equal Employment Opportunity Commission)

*United States v. Jordan*, 890 F.2d 247 (10th Cir. 1989) (condition that probationer incur no new debts reasonably related to the crime of making a false statement to obtain a loan)

*United States v. Cothran*, 855 F.2d 749 (11th Cir. 1988) (condition that probationer stay out of his home county for the first two years of probation reasonably related to goals of rehabilitation and protection of the community)

### **2. Supervised Release Conditions**

*United States v. Cottman*, 142 F.3d 160 (3d Cir. 1998) (required restitution of money the FBI used in a sting operation as a condition of supervised release was improper because the Government was not a victim)



*United States v. Wells Metal Finishing, Inc.*, 922 F.2d 54 (1st Cir. 1991) (payment of a fine was reasonably related to the crime of discharging chemicals into a city sewer system)

*United States v. Mills*, 959 F.2d 516 (5th Cir. 1992) (requirement that defendant sell his car dealership not reasonably necessary to protect the public from further fraud by defendant)

*United States v. Prendergast*, 979 F.2d 1289 (8th Cir. 1992) (special conditions of supervised release imposed on mail fraud offender which prohibited purchase or use of alcohol and subjected him to warrantless searches for alcohol and drugs were abuse of discretion where there was no evidence of alcoholism or alcohol related crime)

*United States v. Chinske*, 978 F.2d 557 (9th Cir. 1992) (special conditions requiring that defendant enter a substance abuse program, not own firearms, submit to searches, and pay a fine, were reasonably related to a conviction for growing and selling marijuana)

*United States v. Amer*, 110 F.3d 873 (2d Cir.), *cert. denied*, 118 S. Ct. 258 (1997): Defendant was convicted for violation of the International Parental Kidnaping Crime Act. The court of appeals approved the requirement that the children be returned to the United States as a condition of supervised release following imprisonment even though the children were then in Egypt and an Egyptian court had granted custody to the defendant. The condition was reasonably related to the offense of conviction and serves the goal of general deterrence.

*United States v. Isong*, 111 F.3d 428 (6th Cir.), *cert. denied*, 118 S. Ct. 212 (1997): After defendant pleaded guilty to immigration charges and was deported, the district court ordered at sentencing that the supervised release term would resume if the defendant re-entered the country. Defendant did re-enter and violated supervised release. The court of appeals rejected his argument that the district court was without authority to toll the running of the supervised release term; the court reasoned that it was an appropriate way to make supervised release meaningful for defendants who are being deported. Dissent urged that supervised release cannot be suspended at the same time that certain conditions of supervised release remain in effect.

*United States v. Ritter*, 118 F.3d 502 (6th Cir. 1997): Defendant, who had been convicted of embezzling from the bank where he worked, was properly ordered to inform his new and future employers of his arrest and conviction as a condition of his supervised release. The requirement fosters the defendant's ability to account for his behavior and remain law-abiding and thus was not an abuse of discretion.